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No. 08-762

In The Supreme Court of the United States

JUAN DEREYES, FRANK JACOBY and MICHAEL FENNER,

Petitioners,

v.

SHAUN WILKINS and ROY BUCHNER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' REPLY MEMORANDUM

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IT IS NOT NECESSARY FOR THIS COURT TO RESOLVE FACTUAL DISPUTES IN THIS CASE

Respondents, in their opposing brief, improperly attempt to convert the legal issues raised in the petition into a dispute about facts. But they cannot obscure the main point: the Tenth Circuit's decision squarely raises the cert-worthy section 1983 Fourth Amendment "malicious prosecution" and related accrual issues identified in the petition. These are, first, whether the tort of malicious prosecution governs section 1983 Fourth Amendment claims based on unlawful detention and, second, whether this Court's decision in *Wallace v. Kato*, 127 S. Ct. 1091 (2007), applies to such claims.

There is no dispute that Petitioners obtained a series of tape-recorded statements from fellow gang members Shawn Popeleski and Lawrence Nieto, that polygraph examinations were conducted during the murder investigation, that these examinations were relevant to the statements, that there were polygraph results obtained in civil discovery and that the district attorney's office advised Petitioners as to the existence of probable cause. The district court addressed all of these facts in its initial opinion on Defendants' qualified immunity motion. *See* App. F: 58-59, 63-70, 85-93, 106-116, 128-131, 134-137. What is at issue is the legal consequences of those facts. Respondents cannot deny that the Tenth Circuit heard Petitioners' appeal and published an opinion as to same, *Wilkins v. DeReyes*, 528 F. 3d 790 (10th Cir.

2008). If this case involved a factual dispute, the Tenth Circuit would have declined jurisdiction in the first instance. *See Johnson v. Jones*, 515 U.S. 304 (1995). It did not do so.

Thus, it is emphatically not necessary for this Court to resolve any factual disputes in this case. Petitioners set out their version of the facts in order to provide a fuller description to this Court of the murders, the investigation of the murders, the charging decisions that were made and the criminal prosecutions of the Respondents. They agree that for purposes of this Petition, the Tenth Circuit's summary of the facts, which is based on the district court's denial of summary judgment based on qualified immunity, is what governs this case in its current posture. And it is that summary of the facts that presents important legal issues as to the elements of section 1983 Fourth Amendment "malicious prosecution" claims based on wrongful detention and, by virtue of malicious prosecution's favorable termination requirement, the relation of such claims to accrual. These important legal issues raise questions of federal law that have not been, but should be, settled by the Court, and as such, are clearly within the Court's certiorari jurisdiction. *See* Rule 10(c).

THERE ARE SUBSTANTIAL CONFLICTS IN THE CIRCUITS CONCERNING SECTION 1983 "MALICIOUS PROSECUTION" CLAIMS

Despite Respondents' argument to the contrary, Petitioners clearly identify substantial conflicts in the circuits as to the use of either state or federal common law in section 1983 Fourth Amendment "malicious prosecution" claims based on unlawful detention, and as to the requirements of favorable termination and probable cause for such claims. There is nothing "subtle" – Respondents' description – about the circuits' use, for example, of the requirement of favorable termination, as the Tenth Circuit expressly did in this case. Moreover, there is nothing "subtle" about the circuits' continuing reliance on the tort of malicious prosecution to determine the scope and elements of section 1983 claims based on detentions that violate the Fourth Amendment.

RESPONDENTS MISREAD *HECK V. HUMPHREY*, 512 U.S. 477 (1994)

Respondents misread *Heck v. Humphrey*, 512 U.S. 477 (1994), as did the Tenth Circuit here. Petitioners again emphasize that, in their view, *Heck* does not involve a section 1983 Fourth Amendment or any other "malicious prosecution" claim. Rather, this Court used the tort of malicious prosecution *by analogy only* when it determined that *any* section 1983 damages claim, if its success would call into question an existing conviction, does not accrue until there is a

favorable termination of the criminal proceeding. *Heck* thus reflected this Court's concern with the intersection of habeas corpus and section 1983. In no way does *Heck* affirm that there is such a thing as a section 1983 "malicious prosecution" claim. *See Wallace v. Kato*, 127 S. Ct. 1091, 1096 n. 2 (2007), which makes clear that the nature of such claims is an open question before this Court.

THE TENTH CIRCUIT IMPLICITLY REJECTED THE APPLICABILITY OF *WALLACE V. KATO*, 127 S. CT. 1091 (2007), TO RESPONDENTS' SECTION 1983 "MALICIOUS PROSECUTION" CLAIM BY APPLYING A FAVORABLE TERMINATION REQUIREMENT

Respondents claim that the applicability of *Wallace* and its accrual doctrine is not properly before this Court because the Tenth Circuit did not exercise pendent appellate jurisdiction over the statute of limitations issue and therefore did not explicitly address it. However, Petitioners repeatedly raised and addressed this issue. The Tenth Circuit even invited supplemental briefing on it. *See* App. E. And there is no dispute that the Tenth Circuit applied a favorable termination requirement to Respondents' section 1983 Fourth Amendment "malicious prosecution" claim based on unlawful detention. How else to characterize this than as a rejection of the applicability of *Wallace* to this case? The result in this case was

to extend the applicable New Mexico statute of limitations and thereby make timely Respondents' section 1983 Fourth Amendment "malicious prosecution" claim. Accordingly, the accrual issue is within the scope of this Court's certiorari jurisdiction. *See* Rule 10(c).

PEARSON V. CALLAHAN, 2009 WL 128768 (1-21-2009), HAS NO BEARING ON THE CERT-WORTHINESS OF THE PETITION

Respondents incorrectly assert that this case is not appropriate for this Court's certiorari jurisdiction after *Pearson v. Callahan*, 2009 WL 128768 (1-21-2009). *Pearson* holds only that the "order of battle" sequence for the qualified immunity determination is no longer mandatory. After *Pearson*, courts may, if they wish to do so, avoid deciding the constitutional merits – part of the section 1983 prima facie case – and may instead dispose of plaintiffs' claims on qualified immunity grounds. Conversely, if they deem it appropriate, courts may decide the constitutional and section 1983 merits in tandem with the qualified immunity determination. In this case, the district court and the Tenth Circuit decided *both* the constitutional merits (ruling that Respondents made out a prima facie section 1983 Fourth Amendment "malicious prosecution" unlawful detention case) *and* the qualified immunity issue (ruling that Petitioners were not entitled to qualified immunity). Thus, neither *Pearson* nor the procedural posture of this

case prevents this Court from addressing the constitutional and section 1983 merits.

CONCLUSION

Respondents do not persuasively counter the policy arguments made by Petitioners as to the national significance, importance and substantiality of the issues raised in this case, the confusion in the circuits and the need to settle the law for the benefit of all, including law enforcement officers who are so often section 1983 defendants. To the contrary: in the Conclusion of their opposing brief, Respondents acknowledge that there is a "split among the circuits on a broad range of issues arising in a Fourth Amendment case sounding in malicious prosecution," that this split is "important," and that "meaningful guidance from this Court" is desirable. Petitioners agree with this assessment. At the same time, they maintain that this case is an excellent vehicle for addressing these long-standing and troublesome section 1983 Fourth Amendment "malicious prosecution" issues. The relevant section 1983 Fourth Amendment and accrual issues are squarely posed and deserve prompt resolution by this Court now so

that the area is finally rationalized. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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